

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Kenneth Erickson, Jr.,
Petitioner,
v.
City of Proctor,
Respondent.

**SUPPLEMENTAL FINDINGS OF
FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on April 9, 1996, at 9:30 a.m. at the Pine County Courthouse, 315 Sixth Street, Pine City, Minnesota, for the purposes of determining damages.

Petitioner Kenneth Erickson, Jr., 10225 Stark Road, Duluth, Minnesota 55810, appeared on his own behalf. Julie Fleming-Wolfe, Popham, Haik, Schnobrich & Kaufman, Ltd., 222 South Ninth Street, Minneapolis, Minnesota 55402-3336, appeared on behalf of Respondent, City of Proctor. The record was closed at the conclusion of the hearing.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Department of Veterans Affairs, Veterans Service Building, 20 West Twelfth Street, St. Paul, Minnesota 55155-2079, telephone number (612) 297-5828.

STATEMENT OF ISSUE

What is the appropriate calculation of damages under the Commissioner's Order in this matter.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On January 23, 1995, Administrative Law Judge Jon L. Lunde issued a report in this matter concluding that Respondent had violated Petitioner's rights under the Veterans

Preference Act by removing Petitioner from employment on July 7, 1992, without notifying him of his rights under that act. Judge Lunde recommended that Respondent be ordered to pay Petitioner back wages, reduced for taxes and retirement contributions that would have been withheld, and reimburse Petitioner for fringe benefits he would have received him the option to resign or be fired. Judge Lunde's report and its recommendations were adopted by the Commissioner of Veterans Affairs in a Decision and Order issued March 8, 1995 (Commissioner's Order).

2. The Findings of Fact in Judge Lunde's report of January 23, 1995, are incorporated as if set forth herein.

3. As of March 17, 1995, Respondent reinstated Petitioner as an employee in compliance with the Commissioner's Order. Petitioner, who had been unable to work and had been out of work receiving workers' compensation since before July 7, 1992, continued in that status. Respondent subsequently properly notified Petitioner of his removal and right to a veterans preference hearing. It was determined after a hearing that the removal was proper, based upon his inability to work due to his injuries.

4. Respondent undertook to determine the appropriate backpay amount for the period of July 7, 1992 to March 17, 1995. The calculations were made by Brian Grave, a new accountant who had received his degree in accounting in May 1992, and who had started working full-time for Respondent on September 1, 1993. As it turns out, he made a number of mistakes in calculating the payroll deductions on the backpay, most of which have now been corrected.

5. The Commissioner's Order specified the following damages:

a) wages Petitioner would have earned, deducting any amount paid in worker's compensation, from July 7, 1992, reducing the award for federal and state withholding taxes, social security or Medicare taxes, and PERA contributions.

b) reimbursement for all fringe benefits he would have received had Petitioner been fully employed with Respondent, with interest at six percent from the date the benefits would have been paid;

6. During the period of July 7, 1992 to March 17, 1995, Petitioner received worker's compensation benefits and was allowed to take his accumulated sick leave to make up the difference between the benefits received and Petitioner's regular salary. Petitioner completely exhausted his sick time during the period.

7. Graves produced a number of computer spreadsheets to determine the amount of backpay. He produced spreadsheets on March 21, 1995, April 11, 1995, and May 3, 1995, all of which he provided to Petitioner within a few days of their creation. Ex. 5, Spreadsheets No. 1, 2 and 3. On April 19, 1995, Petitioner wrote Graves a memo requesting a few changes. Ex. 6A. Petitioner then consulted with an accountant, Duane Forbort, who analyzed Respondent's spreadsheets, prepared a spreadsheet analysis of his own and pointed out several errors in calculating the deductions. Petitioner provided his accountant's information to the Respondent. Ex. 5, Spreadsheet

No. 4; Ex. 6. Nonetheless, Respondent decided to pay Petitioner based upon Graves' calculations. Ex. 5, Spreadsheet No. 5; Ex. A.

8. Graves calculated the backpay amount by taking the hours Petitioner would have worked, plus estimated overtime and compensatory hours at time and one-half, plus vacation and personal leave time hours as they accrued, and multiplied by the hourly wage to arrive at biweekly gross earnings he labeled as "wage" on the spreadsheet. Exhibit 5, Spreadsheet 5. From the gross wage amount for each pay period, Graves calculated the normal percentage for PERA deduction. He then calculated the federal and state tax withholding, and the FICA (Social Security and Medicare) deduction based upon the gross minus PERA figure. After subtracting all the deductions from the gross wage figures, Graves arrived at a figure called "net pay". From the net pay amount, Grave deducted the workers' compensation payment received by Petitioner for the corresponding pay period to arrive at a figure called "net" for each pay period. He then calculated the interest due to Petitioner for each pay period on the net amount at 6 percent per annum from the pay period date to March 17, 1995.

9. Based on the calculations described in the foregoing findings, Graves arrived at the following totals for all the pay periods from July 7, 1992 to March 17, 1995:

Wages	
PERA Deductions	- 4,593.09
Federal Tax Withholdings	- 13,627.34
State Tax Withholdings	- 6,194.24
FICA Deductions	<u>- 7,955.27</u>
Net Pay	\$76,213.72
Worker's Compensation	<u>- 59,890.31</u>
Net	\$16,323.41
Interest to 3/17/95	<u>1,240.13</u>
Total	\$17,563.54

Exhibit 5, Spreadsheet 5.

10. Respondent paid Petitioner \$20,725.85 on August 25, 1995. The amount is comprised of the \$16,323.41 for backpay, \$1,240.13 for interest accrued to March 17, 1995, \$1,840.00 for reimbursement of medical insurance premiums paid by Petitioner, \$531.29 for reimbursement of medical expenses incurred by Petitioner, and \$791.02 for additional interest accrued to August 25, 1995. At the same time, Respondent made the corresponding payments to the Internal Revenue Service, Department of Revenue, and PERA for the deductions and for its contributions.

11. After having submitted the tax withheld and the FICA contribution to the Internal Revenue Service, Respondent was informed that it had incorrectly calculated the FICA (Social Security and Medicare) deduction. The deduction should have been calculated on the gross wages rather than on the gross less the pension deduction.

Graves prepared another spreadsheet on September 14, 1995, Ex. B, in which he recalculated the FICA deductions for each pay period. That changed the amount of the FICA deduction from \$7,955.27 to \$8,306.60. Respondent did not require Petitioner to pay back the additional amount. Instead, it merely changed its reporting to the IRS to allocate more of the amount deducted from the payment to Petitioner to the FICA deduction and less to the federal withholding deduction. Graves never provided a copy of the September 14, 1995 spreadsheet to Petitioner.

12. Early in 1996, Respondent issued a W-2 to Petitioner showing him to have 1995 wages of \$116,881.03. Ex. 15. This amount included a large amount for workers' compensation, which is not taxable and should not have been included in determining the FICA and income tax deductions. The Petitioner called Graves to say that the numbers were wrong on the W-2. Graves called the IRS to check and determined that the accountant was correct, that the workers' compensation payments should not have been included. Graves also learned the social security deduction should have been calculated on the lump sum paid in 1995, rather than spread over the four years from 1992 to 1995. Since there is a limitation of \$61,200 on the amount from which social security is deducted, that mistake had the effect of over-withholding the social security deduction. In late February 1996, Respondent issued a corrected form W-2c to correct the errors. Ex. 20. The amount of state and federal income taxes over-withheld from the payment to Petitioner will be returned to Petitioner as a refund on his 1995 taxes. The amount of social security over-withheld will be returned to the Respondent, who will then return it to Petitioner under an agreement signed by Petitioner.

13. Petitioner incurred accounting fees of \$385 for the review of the Respondent's spreadsheets, meeting with Respondent and preparation of Petitioner's tax return (\$60). Ex. 12.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction over the subject matter of this hearing, pursuant to Minn. Stat. §§ 14.50 and 197.481.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. Respondent incorrectly calculated the withholding for federal and state taxes, FICA (Social Security and Medicare) and PERA by including worker's compensation benefits as income earned as wages from Respondent. Respondent incorrectly calculated the social security deduction and its contribution by allocating the backpay over the entire period rather than considering it a lump sum payment in 1995.

The tax and social security errors will be corrected by tax refunds and the social security refund to be made. No mention of the PERA error was made at the hearing.

4. Respondent's calculation of interest on the backpay was incorrect in that it was computed on the net pay after deductions for taxes, FICA and PERA. That was inappropriate because those deductions are Petitioner's money, not Respondent's, and he is entitled to interest on them until they are actually paid over to the IRS, Department of Revenue, or PERA. Likewise, by over-withholding the FICA, federal and state income tax, Petitioner has lost the interest on that money from August 25, 1995, until the date he receives his refunds. Petitioner is, therefore, entitled to payment of additional interest.

5. Petitioner's additional interest should be computed as follows:

<u>Item</u>	<u>Amount</u>
Projected Wages	\$ 108,583.66
Workers' Comp. Received	- 59,890.31
Gross Backpay	<u>\$ 48,693.35</u>
Interest on Average Balance of \$24,346.68 at 6 Percent from 7/92 to 3/95	<u>\$ 3,932.93</u>
Interest on \$48,693.35 - 3/95 to 8/95	<u>\$ 1,217.33</u>
Total Interest	<u>\$ 5,140.26</u>
Interest Paid - 8/25/95	<u>\$ 2,031.15</u>
Underpayment of Interest	<u>\$ 3,109.11</u>

To determine the proper deductions, Respondent should have used Petitioner's gross backpay amount of \$48,693.35 as the base and considered it a lump sum payment when made on August 25, 1995. On that amount, the PERA deduction of 4.23 percent would have been \$2,059.73 instead of the \$4,593.09 actually deducted. The FICA amount at 7.65 percent would have been \$3,725.04 instead of the \$7,955.27 actually deducted. Petitioner's withholding for federal income tax and state income tax, based upon the taxable amount of gross less PERA deduction, and computed on an annual basis for a married person with two withholding allowances, would have been \$5,284.95 and \$2,906.09, respectively, as compared to the \$13,627.34 and \$6,194.24 actually withheld. The tax calculations are based upon 1995 Circular E and 1995 Minnesota Income Tax Withholding Instructions and Tax Tables. Ignoring the PERA because it is presumably invested and earning a return, Respondent over-withheld taxes and FICA by \$15,860.77. While that amount will be returned through tax refunds, Petitioner has lost the interest on it from August 25, 1995, until the refunds are received. Assuming that to be approximately May 1, 1996, Petitioner is entitled to an additional eight months of interest thereon at 6 percent, or \$634.43. In summary, Petitioner is entitled to \$3,109.11 as underpayment of interest on August 25, 1995, plus interest thereon at 6 percent per annum until paid, plus \$634.43 as interest on the over-withholding of FICA and income tax.

6. Respondent has properly reimbursed Petitioner for fringe benefits. Petitioner is not entitled to cash on the sick leave that he would have used while he was on workers' compensation. Petitioner has already been paid by Respondent in cash through the backpay award for the difference between his regular pay and the workers' compensation he received. By awarding him 504 hours of sick leave accrued during the period, Respondent has more than compensated Petitioner for his sick leave. Likewise, Petitioner is not entitled to cash payments for medical insurance premiums that would have been made had he remained in employment status in the first instance. Instead, Respondent has reimbursed Petitioner for all medical insurance premiums that he paid as well as reimbursed him for all medical expenses he happened to incur. Again, Petitioner has been fully compensated for his medical insurance.

7. The errors made by Respondent in the calculation of withholding and FICA contributions were made in good faith.

8. Petitioner is not entitled to be reimbursed for his accounting expenses. While that is a cost of the litigation, it is not an element of his backpay.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that Respondent make the following additional interest payments to

Petitioner Kenneth Erickson, Jr.: Underpayment of interest on backpay, \$3,109.11, plus interest thereon at 6 percent per annum from August 25, 1995 until paid in full, and \$634.43 as interest on over-withholding.

Dated this 13th day of May, 1996.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped (one tape)

MEMORANDUM

Petitioner argues that he would have been able to take his sick time over the period he was out on worker's compensation and therefore, any sick time he accumulated over the period he was improperly discharged should be paid to him in cash. Respondent allowed Petitioner to supplement his worker's compensation payment with sick time, to the full amount of what Petitioner would have ordinarily earned in his position. Respondent has credited Petitioner's sick time account with the total hours he accumulated over the period of his unlawful termination. Respondent has also paid Petitioner directly (through the backpay award) for the portion of his usual wages not covered by worker's compensation. The sick hours credited to Petitioner reimburses him for sick hours that he would have earned over that period. Such hours cannot be converted to cash, since the only time he would have been able to use the sick time for was already paid for by the backpay award. Allowing Petitioner to take his sick leave in the form of cash would constitute a windfall to him.

Petitioner asserts that he should be paid the amount Respondent would have had to pay for medical care insurance to meet the requirements of the Commissioner's Order. Respondent asserts that Petitioner is only entitled to have medical care costs paid for and insurance costs under COBRA (the employee's maintenance of group insurance) paid back. Both of these items have been paid by Respondent. The Commissioner's Order requires "reimbursement." This term connotes the payment of any costs incurred by the Petitioner, whether in medical bills or insurance premiums. The term does not extend to an independent award of damages without regard to actual costs incurred.

Upon his return to work, Petitioner was treated as a new employee, and therefore was not covered by insurance for a ninety day period and preexisting conditions were not covered for an extended period. This treatment was due to the insurance policy's provisions, not Respondent. Respondent's obligation to reimburse expenses includes any expenses incurred during the waiting periods or otherwise not covered. The evidence in the record indicates that Respondent has paid those expenses. There is no additional remedy to be awarded to the employee on the fringe benefit portion of the Commissioner's Order.

Due to errors made in the calculation of wages and deductions, Petitioner has experienced a loss of the use of his money that has been remedied by the awarding of additional interest.

S.M.M.